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PLAINTIFFS' REPLY IN SUPPORT OF MOTION
FOR SCHEDULING ORDER - 1
CASE NO. 3:19-CV-00265-SLG CONSOLIDATED

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA
AT ANCHORAGE

BRISTOL BAY ECONOMIC
DEVELOPMENT CORPORATION, *et al.*,

CASE NO. 3:19-CV-00265-SLG

Plaintiffs,

v.

CHRIS HLADICK, U.S.
ENVIRONMENTAL PROTECTION
AGENCY, *et al.*,

Defendants.

SALMONSTATE, *et al.*,

CASE NO. 3:19-CV-00267-SLG

Plaintiffs,

v.

CHRIS HLADICK, U.S.
ENVIRONMENTAL PROTECTION
AGENCY, *et al.*,

Defendants.

TROUT UNLIMITED,

CASE NO. 3:19-CV-00268-SLG

Plaintiffs,

v.

U.S. ENVIRONMENTAL PROTECTION
AGENCY, *et al.*,

Defendants.

PLAINTIFFS' REPLY IN SUPPORT OF MOTION
FOR SCHEDULING ORDER - 2
CASE NO. 3:19-CV-00265-SLG CONSOLIDATED

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PLAINTIFFS' REPLY IN SUPPORT OF
MOTION FOR ENTRY OF SCHEDULING ORDER

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Plaintiffs submit this Reply in support of their Motion for Entry of Scheduling Order (ECF 23 & 24) (“Motion”).

Plaintiffs have proposed a scheduling order based on the need for a final ruling on the merits of the withdrawal of the 2014 Proposed Determination of Defendant Environmental Protection Agency (“EPA”) under Section 404 of the Clean Water Act, before the U.S. Army Corps of Engineers (“Corps”) issues a record of decision on a permit application for the proposed Pebble Mine in Bristol Bay, Alaska. In response, Defendants mostly take issue with Plaintiffs’ proposed deadlines for filing their opening brief and for motions to supplement the agency record. ECF 25 (“Resp.”). But Defendants’ arguments are overstated and otherwise without merit.

1. Plaintiffs have structured their proposed schedule based on their expectation that the Corps will issue its permitting record of decision in May 2020. Mot. at 4. In response, however, Defendants assert they “are not in a position to state when the Corps will make a permit decision.” Resp. at 3. But in EPA’s August 30, 2019, notice of its decision to withdraw the Proposed Determination, the agency stated it “has and will continue to work constructively with the Corps as a cooperating agency” and that “EPA plans to continue to work with the Corps . . . on the next steps in the [National Environmental Policy Act] process, including the development of the final [Environmental Impact Statement] and other information to inform the Corps’ permit decision.”¹ And

¹ EPA, Notification of Decision to Withdraw Proposed Determination to Restrict the Use of an Area as a Disposal Site; Pebble Deposit Area, Southwest Alaska, 84 Fed. Reg. 45,749, 45,754 (Aug. 30, 2019).

1 documents received in September 2019 from the Corps pursuant to a Freedom of
2 Information Act request show the Corps intends to issue its final record of decision for the
3 Pebble Mine permit by May 29, 2020. *See* Ex. A (attached hereto).² If Defendants have
4 more accurate information about the Corps' permitting timeline (especially given
5 Defendants' stated cooperation with the Corps), Defendants should share such information
6 with Plaintiffs and the Court to ensure a timely and orderly resolution of this matter under
7 a schedule that obviates the need for additional or interim relief. The expected timing of
8 the Corps' issuance of its final record of decision is an ascertainable fact relevant to the
9 Court's schedule for this matter and its ability to provide timely relief.

10

11 2. In their Response, Defendants express concern that, under Plaintiffs'
12 proposed schedule, Plaintiffs would file their opening merits brief before any motion to
13 supplement (should there be one) is fully briefed and decided. Resp. at 3-4. But this Court
14 recently has approved a scheduling order under which merits briefing would begin prior to
15 the resolution of any motion to supplement the agency record. *See* Scheduling Order at 1-
16 2, *Se. Alaska Conservation Council v. U.S. Forest Serv.*, No. 1:19-cv-00006-SLG, ECF 7
17 (D. Ala. June 13, 2019) (providing parties would "work in good faith to address any and
18 all issues concerning the adequacy, scope, and/or content of the administrative record
19 amongst themselves" and "[a]ny issues which the Parties cannot resolve among themselves
20 shall be presented to the Court for resolution on the same schedule proposed for the
21 Parties' Rule 16.3(c) briefs"). Here, Plaintiffs do not currently anticipate that motions to

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24 ² The documents in Exhibit A were produced by the Corps pursuant to an August 16,
25 2019 FOIA request submitted by the Natural Resources Defense Council seeking "all
26 records in the Army Corps' possession, custody or control sent or received from the
following email address: poaspecialprojects@usace.army.mil" (the email address believed
to be used for communicating about the Pebble Mine permitting process). *See* Ex. A.

1 supplement will be necessary. But even if they are, such motions would be limited, and to
2 the extent they would interfere with merits briefing deadlines, then those deadlines could
3 be adjusted when and if that exigency arises.

4 3. Similarly, Defendants assert that Plaintiffs' proposed schedule would
5 "unfairly" reduce Defendants' time to file an opposition to any motion to supplement from
6 14 to seven days. Resp. at 4. But again, it is unlikely there will even be a need to file a
7 motion to supplement. And even if such a circumstance should arise, it is expected that
8 any such motion would be very limited, and Defendants would be able to request
9 additional time to respond for good cause if it were necessary to do so.

10 4. Finally, in anticipation that intervenor-defendants may seek to participate in
11 these proceedings, and to facilitate efficiency, Plaintiffs proposed that any intervenor-
12 defendants' brief on the merits be filed one week after Defendants' brief and be limited to
13 4,000 words. Mot. at 4. Defendants, however, argued in response that because no parties
14 have actually sought to intervene, it is premature and inappropriate to set limits on such
15 intervention at this time. Resp. at 5. But there is no harm setting such a comprehensive
16 schedule now, since doing so will avoid any case disruption later should a party seek to
17 intervene. Nor have Defendants shown that Plaintiffs' proposed requirements for
18 intervenors would cause any prejudice to them or any prospective intervenor. To the
19 contrary, since the interests of intervenor-defendants would largely be aligned with those
20 of Defendants', it is entirely fair and appropriate for the intervenor briefs to follow shortly
21 after the filing of Defendants' briefs. And Plaintiffs' proposed word count for intervenor-
22 defendant merits briefs (4,000 words) is double what Plaintiffs' reserved for each plaintiff
23 group should they file supplemental merits briefs (2,000 words). Mot. at 4 & 5.

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2 For all the foregoing reasons, the Court should grant Plaintiffs' Motion and enter the
3 scheduling order as proposed by Plaintiffs. *See* ECF 23, at 4-6.

4 DATED this 12th day of November, 2019.
5

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PLAINTIFFS' REPLY IN SUPPORT OF MOTION
FOR SCHEDULING ORDER - 6
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PLAINTIFFS' REPLY IN SUPPORT OF MOTION
FOR SCHEDULING ORDER - 7
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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2019, a copy of the foregoing Plaintiffs' Reply in Support of Motion for Scheduling Order was served upon counsel of record through the Court's CM/ECF system.

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PLAINTIFFS' REPLY IN SUPPORT OF MOTION
FOR SCHEDULING ORDER - 8
CASE NO. 3:19-CV-00265-SLG CONSOLIDATED

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14 DATED this 12th day of November, 2019.

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19 PLAINTIFFS' REPLY IN SUPPORT OF MOTION
20 FOR SCHEDULING ORDER - 9
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